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CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
NEW RIVER COLLIERIES COMPANY. } No. 316.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE UNITED STATES.

The sole question involved in this case is the amount of compensation the plaintiff is entitled to for upwards of 60,000 tons of coal which the Navy requisitioned at Hampton Roads on different dates between September 18, 1919, and January 18, 1921. There is no dispute as to the number of tons taken nor as to the dates on which the coal was requisitioned, these facts being admitted by the pleadings. The requisition took place under §10 [1] of the Lever Act, 40 Stat. 276, 279. In accordance with the provi-

[1] That the President is authorized, from time to time, to requisition * * * fuels; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation (etc.).

sions of this section, the President, through the Navy, in September, 1919, fixed the amount of just compensation at $3.08 a ton. In order to take care of a wage increase allowed by the mine operators to the miners, this amount was, at a subsequent date, increased to $3.33 a ton; and still later to $4.42 a ton (125). The plaintiff declined to accept these prices.

In accordance with the provisions of that section it was paid 75 per cent of what it was entitled to on the basis of these figures,[2] and thereupon brought this suit to recover what it conceived to be just compensation, less, of course, the 75 per cent already received. Three complaints in all were filed, covering different periods. But the allegations in each are the same, and the cases were accordingly consolidated for the purposes of trial. The prices which the plaintiff sought to recover ranged from $5 a ton in September, 1919, to $4.70 in January, 1921, the highest price being reached in August, 1920, the plaintiff claiming compensation at the rate of $16 a ton for the coal requisitioned during that month. The plaintiff at the trial introduced evidence of certain market prices prevailing at Hampton Roads on the various dates the coal was requisitioned, the prices being substantially in accordance with the schedules annexed to the complaints. The government contended that the market through-

[2] The plaintiff had not, at the time of trial, actually received the full 75 per cent, but it was stipulated that the case should proceed as though this percentage had been paid in full, the plaintiff having received assurances that this sum would in due time be paid.

out the period in question was a speculative and abnormal one, justifying a departure from the usual rule that the value of an article is to be determined by the market price. While not denying that these market prices were admissible in evidence as affording some aid to the jury in determining the compensation to be allowed, the government, nevertheless, contended that it should be allowed to prove the *real* as distinguished from the *market* value of the coal. But the court would not allow the testimony to be introduced. The government offered no testimony contradicting that given by the plaintiff's witnesses as to market prices, and the court would have directed a verdict had it not been for the fact that there was a slight disagreement among the plaintiff's witnesses as to the market prices on certain dates.

It developed at the trial that there were in fact two markets, one domestic and the other export, the domestic being lower than the export. The extent of the difference between the two was not shown, the court refusing to allow the government to introduce such evidence. The testimony, however, developed the fact that during the period the Fuel Administration was functioning—November 1, 1919, to April 1, 1920—the export price was $4.536, while the domestic price was about $1.50 per ton lower.

At this juncture it is important to an understanding of the case that we define certain terms employed by the witnesses during the trial. Contract coal, as the term implies, is coal furnished by mines under a

contract entered into in advance, usually in April of each year, delivery to be made in designated quantities throughout the life of the contract in accordance with its terms. Spot coal, as the term also implies, is coal that is not contracted for in advance; in other words, coal sold for immediate delivery. Free coal is coal on hand not immediately required for the fulfillment of a contract, and is in substance the same as spot coal. Free coal arose in two ways. It would sometimes happen that the carrier in placing empties at the mines would deliver more than the number ordered, and this would result in allowing them to be loaded with free coal. It would also happen that on the arrival at Hampton Roads of cars loaded with contract coal, the vessel for which the coal was intended had been delayed by storm or other causes. Accordingly if there was sufficient time to permit hauling the cars back to the mines for reloading and reshipment, this course would be followed, with the result that the coal in the first shipment would become free coal. The plaintiff during the period in question sold about 907,000 tons a year, 610,000 of which went into the export and bunker trade. Of the 907,000 tons about 35 per cent was contract coal, about 33 per cent spot coal, and about 31 per cent coastwise and inland coal.

What the price of the contract coal was does not appear. Of course it would vary according to the contract, but the court would not permit the Government to go into this matter. There is no evidence in the case from which it can be determined whether

the coal that was requisitioned was free or contract coal. The plaintiff, however, introduced evidence to the effect that the demand for export coal was strong and that the plaintiff would have had no difficulty in selling in the spot export market the coal which the government requisitioned; and its position was that inasmuch as this market offered the highest prices obtainable for coal, just compensation demanded that it should be paid on the basis of that market. The trial court adopted this view and charged the jury accordingly. The plaintiff recovered judgment for upwards of $242,000, which on error was affirmed by the Court of Appeals.

This statement is intended to give only a general outline of the case. As the discussion proceeds it will be necessary to examine portions of the testimony in detail, and appropriate page references to the record will then be given.

While the case, in its immediate aspect, presents only the question of how just compensation is to be determined, as that term is employed in §10 of the Lever Act, it will nevertheless be seen, from what we have already said, that the meaning of those words as used in the Fifth Amendment is necessarily involved.

ASSIGNMENTS OF ERROR.

Our assignments of error, 39 in number and comprising 21 printed pages, need not of course be repeated here.[3] They present in substance two

[3] These assignments come close to falling within the criticism contained in *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, but no one can deny that they fairly raise the questions which we here discuss.

questions: (1) Whether, under the circumstances disclosed by this record, market prices must alone control in determining just compensation; and (2) whether, if market prices are to control, it was improper to exclude any evidence offered by the government as to the market price of domestic as distinguished from export coal, and also whether evidence offered by the government of the contract market value of coal was improperly excluded.

Our brief will accordingly be divided into two main divisions:

1. The court was wrong in refusing, under the circumstances disclosed by this record, to allow the government to introduce evidence of the real value of the coal as distinguished from its market value, and in holding that the market prices of this commodity were alone controlling in determining just compensation.

2. Even if we are wrong in maintaining, under the circumstances disclosed by this record, that market prices are not controlling, the court nevertheless committed error in refusing to admit evidence as to domestic market prices and in holding that spot export market prices alone control.

The court was wrong in refusing, under the circumstances disclosed by this record, to allow the government to introduce evidence of the real value of the coal as distinguished from its market value, and in holding that the market prices of this commodity were alone controlling in determining just compensation.

IT IS UNDENIABLY TRUE THAT MARKET VALUE USUALLY FURNISHES THE BASIS FOR DETERMINING THE PECUNIARY EQUIVALENT OF A GIVEN ARTICLE. BUT SOMETIMES AN ARTICLE HAS NO MARKET VALUE, IN WHICH CASE PROOF OF REAL VALUE IS ADMISSIBLE. THIS DEMONSTRATES THAT MARKET VALUE AND JUST COMPENSATION ARE NOT NECESSARILY SYNONYMOUS. IF THAT WERE THE CASE THE COURTS WOULD BE POWERLESS TO AWARD COMPENSATION FOR AN ARTICLE HAVING NO MARKET VALUE.

It is of course axiomatic that proof of real value is admissible where there is no market value.

1 *Sedgwick on Damages* (9th ed.), §§250, 251.

The Harmonides, (1903) P. 1.

This demonstrates that just compensation does not *necessarily* mean market value.

JUST COMPENSATION AND REASONABLE COMPENSATION MEAN THE SAME THING.

Sweet v. *Rechel*, 159 U. S. 380, 400.

Neither term of course justifies the conclusion that compensation *must* be measured by market value. Testimony as to market value may be a convenient method of determining just compensation. But it is certainly not the only method. The fundamental inquiry, after all, is, what is *just* compensation. And market value is merely the means, but not necessarily the *only* means, of finding an answer to this inquiry.

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THIS COURT HAS DECLARED THAT JUST COMPENSATION MUST BE A FULL AND FAIR EQUIVALENT FOR THE PROPERTY TAKEN. BUT OBVIOUSLY THIS CAN NOT MEAN THAT MARKET VALUE AFFORDS THE ONLY RULE FOR DETERMINING WHAT THIS EQUIVALENT IS.

In *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, this court declared unconstitutional an act of Congress which, in directing condemnation proceedings for the acquisition of a lock and dam in a navigable river, attempted to provide that the company's franchise to collect tolls, given to it by the state of Pennsylvania, must be excluded in ascertaining the compensation to which it was entitled. In speaking of the Fifth Amendment the court says (p. 326):

> The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the

> compensation must be a full and perfect equivalent for the property taken.[4]

We may therefore accept it as settled law that the owner is entitled to the "full and perfect equivalent" of property taken for public uses. But this still leaves open the question as to how this equivalent is to be ascertained. The case falls far short of establishing the proposition that market value alone is to be resorted to.

The court went on to say (p. 327):

> It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation.[5] The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

THE PRINCIPLE WE CONTEND FOR IS STRIKINGLY EXEMPLIFIED BY THE DECISION OF THE SUPREME COURT OF MASSACHUSETTS IN BEALE V. BOSTON, 166 MASS. 53.

In this case Beale, the owner, laid out a ten-acre tract into lots and streets, one of which—Tuttle

[4] On the main question—the constitutionality of the act declaring that no allowance shall be made for the value of the franchise to collect tolls—the case has been limited and explained, if not indeed impliedly overruled. *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82; *Greenleaf Lbr. Co.* v. *Garrison*, 237 U. S. 251. But that is not material here.

[5] Although the present case does not raise the question, the correctness of the latter part of this statement must nevertheless be challenged. It is inconsistent with *Bauman* v. *Ross*, 167 U. S. 548. See also *McGovern* v. *New York*, 229 U. S. 363, and *McCoy* v. *Union Elevated R. R. Co.*, 247 U. S. 354, which, although involving the Fourteenth Amendment, are nevertheless apposite. What the court probably meant to say was that Congress was powerless to prescribe any measure of compensation which would in effect rob the owner of this constitutional guarantee.

street—the city of Boston later sought to condemn for a public highway. Beale sought damages both for the property actually taken and for the diminished value of his land abutting on the condemned area. As already indicated, the property sought to be taken was in fact a street, but not a public street, although it was burdened with easements in favor of abutting lot owners. In order to prove the worth of the condemned area—Tuttle street—Beale offered evidence of value other than market value. But the court ruled that this was inadmissible and that market value alone must control. The jury were charged in accordance with this view. On Beale's appeal the judgment was reversed, the court saying (p. 55):

> The jury were thus limited exclusively to a consideration of market values; and this, having regard to the nature and situation of the land taken, we think was erroneous. Ordinarily, where the value of lands or goods is to be ascertained, and they are of such a kind and so situated as to be available for sale in the ordinary course of trade or dealing, the market value is perhaps the best test, and under such circumstances it is usually adopted in this Commonwealth. * * * But market value is not a universal test, and cases often arise where some other mode of ascertaining value must be resorted to.
>
> The petitioner retained the ownership of Tuttle Street, subject to rights of way and drainage which he had granted therein. This title might not be salable in the ordinary

course of dealing, and yet it might have a real value to him, for which he was entitled to be paid.

It will thus be seen that evidence of market value was in fact introduced, and the jury's verdict was based on that sort of proof; but the court was of the opinion that, under the circumstances, it was unjust to limit the proof to market value alone. That is exactly what we contend for here.

To the same effect see *Wall* v. *Platt*, 169 Mass. 398.

THE MARKET VALUE OF AN ARTICLE IS ONLY A MEANS OF ARRIVING AT ITS REAL VALUE.

"The market price of an article is only a means of arriving at its real value. It is not itself the value of the article, but it is evidence of the value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption." *Hale on Damages*, 274.

"Wherever the measure of damages involves the question of value, however much the market may be resorted to to determine what the value is, this resort is had as furnishing usually the best *evidence* of value." 1 *Sedgwick on Damages* (9th ed.), § 243.

THE PROOF INTRODUCED IN THIS CASE SHOWS BEYOND ALL QUESTION AN INFLATED MARKET AND DEMONSTRATES THE INJUSTICE OF BASING JUST COMPENSATION ON SUCH MARKET PRICES.

From October 31, 1919, to April 1, 1920, the Fuel Administration fixed the export price at $4.536 a ton at the mines (42, 86, 94, 97). The proof introduced by the plaintiff shows that the moment government

price fixing regulation was withdrawn, the price rapidly advanced. This is graphically portrayed by one of the questions and answers: "Q. And apparently from the figures which you have given, as soon as the lid was off the price went up? A. It looks that way" (86). By July and August, 1920, the price, according to one of the claimant's witnesses, had amounted to $16 a ton (43, 75), and, according to another, to $17.50 (72). In one instance the steamship *Kate* was compelled to pay $20.20 (84). At times the prices fluctuated on certain days to the extent of $3 a ton (90). The prices varied even between different piers. A ship at one pier needing only a few tons might find it cheaper to pay $50 a ton than to move to another pier (91). Prices, at least during a portion of the period, went up and down very rapidly (50).

One of the reasons for high prices was the demand from abroad (60, 73, 88). "Every day we were having people coming into our office representing firms on the other side trying to buy coal" (88). Prices began to drop in the fall of 1920. The demand from abroad fell off. France, which from June to September had ordered more than she needed, was now flooded with coal; and at Rotterdam cargoes could not be unloaded because so much coal was on hand (85).

As already indicated, the prices fixed by the fuel administrator for *export* coal between October 31, 1919, and April 1, 1920, was $4.536. But the price fixed for *domestic* coal was much lower. It was around $3.50 or $3.25 (86). There was a difference

of $1.50 in the price fixed by the fuel administrator for export and domestic coal (64). It is, of course, fair to presume that the prices thus fixed by the fuel administrator were fair and reasonable. And if such prices yielded a fair profit, what is to be said of the profits that must have been realized when coal jumped in August, 1920, to $16 a ton? Does the Fifth Amendment inexorably demand that, under such circumstances, market value alone *must* control in determining *just* compensation?

IN THIS CONNECTION IT SHOULD BE BORNE IN MIND THAT JUST COMPENSATION MEANS A COMPENSATION THAT IS JUST TO THE PUBLIC AS WELL AS TO THE OWNER.

Garrison v. *New York*, 21 Wall. 196, 204.
Searl v. *School District*, 133 U. S. 553, 562.
Bauman v. *Ross*, 167 U. S. 548, 574.

IT IS INTERESTING TO NOTE THAT IN ENGLAND LEGISLATION HAS BEEN ENACTED AND REGULATIONS PROCLAIMED, AS A RESULT OF WAR CONDITIONS, LAYING DOWN CERTAIN PRINCIPLES TO BE FOLLOWED IN DETERMINING THE AMOUNT OF COMPENSATION AN OWNER IS ENTITLED TO FOR PROPERTY THAT HAS BEEN REQUISITIONED. THE AVOWED OBJECT OF THIS LEGISLATION AND OF THESE REGULATIONS IS TO SECURE JUST COMPENSATION—JUST TO THE PUBLIC AS WELL AS TO THE OWNER—AND IT WILL BE NOTED THAT WHILE MARKET VALUE IS AN ELEMENT TO BE CONSIDERED, IT IS EXPRESSLY PROVIDED THAT IT SHALL NOT BE CONCLUSIVE.

1. On account of the contrast which it affords, attention is first called to the Army Act of 1881 (44

and 45 Vict., c. 58), authorizing the navy and the army to impress carriages, animals, and vessels. Its scope was enlarged by the Army Act of 1914 (4 Geo. 5, c. 26), so as to authorize the requisitioning of food, forage, and stores of all descriptions; and it was further amended by the Army Act of 1915 (5 Geo. 5, c. 26). As thus amended the act provides that if the parties disagree as to the price to be paid, the claimant is authorized to apply to the county court, which is empowered to determine compensation in accordance with a schedule [6] which reads as follows:

> The amount fixed * * * shall be such amount as appears to the county court judge to be the *fair market value* of the article requisitioned on the day on which it was required to be furnished as between a willing buyer and a willing seller. * * *

2. By order No. 1699,[7] The Defence of the Realm, November 28, 1914, general authority is given (Regulation 2), to do any act involving interference with the rights of property which is necessary for the defence of the realm. Regulation No. 7 of this order reads in part:

> The Admiralty or Army Council may by order require the occupier of any factory or workshop * * * to place at their disposal the whole or any part of the output of the factory or workshop * * * ; and

[6] Chitty's Annual Statutes, 1915, p. 655.
[7] Statutory Rules and Orders, 1914, vol. 1, p. 510.

> the occupier of the factory or workshop shall be entitled to receive in respect thereof such price as, in default of agreement, *may be decided to be reasonable having regard to the circumstances of the case* by the arbitration of a judge of the High Court selected by the Lord Chief Justice of England in England, by a judge of the Court of Session selected by the Lord President of the Court of Session in Scotland, or by a judge of the High Court of Ireland selected by the Lord Chief Justice of Ireland in Ireland.

This regulation was amended in 1916 [8] by adding (*inter alia*):

> In determining such price regard *need not be had to the market price*, but shall be had to the cost of production of the output so requisitioned and to the rate of profit usually earned in respect of the output of such factory or workshop before the war, and to any other circumstances of the case.

3. Order No. 190, February 23, 1917, Regulation 2B[9], which deals with the compensation to be paid for articles requisitioned by the Admiralty, or Army Council, or Minister of Munitions, or the Food Controller,[10] reads in part as follows:

> Where any goods, possession of which has been so taken, are acquired by the Admiralty

[8] Statutory Rules and Orders, 1916, vol. 1, p. 222.

[9] Statutory Rules and Orders, 1917, p. 270.

[10] The Food Controller was included in Order No. 190 by virtue of Order No. 656, June 28, 1917, Statutory Rules and Orders, 1917, p. 296.

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or Army Council or the Minister of Munitions, the price to be paid in respect thereof shall, in default of agreement, be determined by the tribunal by which claims for compensation under the regulations are, in the absence of any express provision to the contrary, determined.

In determining such price regard *need not be had to the market price*, but shall be had—

(*a*) if the goods are acquired from the grower or producer thereof, to the cost of production and to the rate of profit usually earned by him in respect of similar goods before the war and to whether such rate of profit was unreasonable or excessive, and to any other circumstances of the case;

(*b*) if the goods are acquired from any person other than the grower or producer thereof, to the price paid by such person for the goods and to whether such price was unreasonable or excessive, and to the rate of profit usually earned in respect of the sale of similar goods before the war, and to whether such rate or profit was unreasonable or excessive, and to any other circumstances of the case; so, however, that if the person from whom the goods are acquired himself acquired the goods otherwise than in the usual course of his business, no allowance, or an allowance at a reduced rate, on account of profit shall be made.

4. Order No. 1190, November 16, 1917, Regulation 2jj,[11] which gives authority to the board of

[11] Statutory Rules and Orders, 1917, pp. 322, 323.

trade to requisition any horse or horse-drawn vehicle, provides that in default of agreement compensation is to be determined by an arbitrator in accordance with rules which read:

> Such compensation shall be paid for any horse or horse-drawn vehicle so taken possession of as shall, in default of agreement, be determined by the arbitration of a single arbitrator appointed in manner provided by an order of the Board of Trade; but in determining the amount of the compensation the arbitrator shall have regard to the age and condition of the horse or vehicle, to the allowance of a reasonable profit on the price, if any, paid by the person from whom the same is taken, and to any other circumstance *without necessarily taking into consideration the market price at the time.*

5. Order No. 5, January 10, 1917, Regulation 2f(2),[12] which authorizes the Food Controller to requisition food supplies, provides as follows with respect to compensation:

> Such compensation shall be paid for any article or stock so requisitioned as shall, in default of agreement, be determined by the arbitration of a single arbitrator appointed in manner provided by the order; but in determining the amount of the compensation the arbitrator shall have regard to the cost of production of the article and to the allowance of a reasonable profit, *without necessarily taking*

[12] Statutory Rules and Orders, 1917, p. 247.

into consideration the market price of the article at the time.[13]

6. The last act to be mentioned is the Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48),[14] the nature of which is indicated by its title: "An Act to restrict the taking of legal proceedings in respect of certain acts and matters done during the war, and provide in certain cases remedies in substitution therefor, and to validate certain proclamations, orders, licences, ordinances, and other laws issued, made, and passed, and sentences, judgments, and orders of certain courts given and made during the war."

The act provides that in certain designated cases compensation is to be made in accordance with the schedule annexed thereto. Part I of this schedule reads:

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[13] The meaning of this regulation was under consideration by the Court of Appeal in *Danish Bacon Co.* v. *Ministry of Food*, 38 The Times Law Reports, 507, March 23, 1922. In reporting the oral utterances of Lord Justice Bankes, the reporter says: "That regulation, so far as it referred to compensation, appeared to him [the Lord Justice] to have been drafted from the point of view that, having regard to the extraordinary state of things existing in the country at the time, *the disorganization of trade and the scarcity of various articles of food, market prices, where there were market prices, were no longer an indication of the real value of the goods in the sense of the value to the person to whom compensation was to be paid.* The market prices might be much too high or much too low. Therefore a particular form of words had been adopted in order to arrive at a formula which should be a guide to an arbitrator and give him a full discretion in endeavoring to arrive at what should be a fair measure of compensation. * * * His Lordship then read the clause as to compensation in Regulation 2F and said that those words seemed to provide that the arbitrator must have regard to, that was to say, must not disregard, the cost of production and the allowance of a reasonable profit, but that subject to that he was to have a free hand to consider what was the fair and reasonable amount of compensation and *not necessarily to be bound by the market price of the article.*"

[14] Chitty's Annual Statutes, 1920, p. 835.

> The payment or compensation to be awarded for the use of a ship, or vessel, or cargo space, or passenger accommodation therein, and for services rendered shall be based on the rates and conditions contained in the Blue Book reports, or in cases of a class where those rates and conditions have not been applied on some other liberal estimate of the profits which the owner could have made if there had been no war, and shall be assessed *without taking into account any increase of market values* of tonnage or of rates of hire due to the war, together with, in cases where damage to or loss of the ship or vessel directly due to such use has occurred, a sum by way of compensation in respect of such loss or damage, so, however, that nothing shall be awarded for any other damage or loss incidentally caused to the owner or to other persons.[15]

The validity and interpretation of these various legislative acts and regulations have been frequently before the courts.

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[15] In speaking of this portion of the Indemnity Act, 1920, Scott & Hildesley, in their book on "The Case of Requisition," say, at p. 165: "How the courts will in such cases interpret the direction that regard is to be had to the war and to all other relevant circumstances, it is not easy to forecast. In the case of ships, however, and still more in the case of chattels the position is even more obscure. According to the decision in *Newcastle Breweries (Ltd.)* v. *The King*, (1920), 1 K. B. 854 [the case has since been overruled], the right to compensation for goods requisitioned for the Navy or Army is a statutory right, the compensation being assessable on the basis of the fair market value. But for this measure there is now substituted the principle of assessment upon the basis of cost, together with an allowance for profit at the rate usually earned before the war, as provided by Defence of the Realm Regulation 2B."

(H. of L.) *Attorney General* v. *Royal Mail Steam Packet Co.*, [1922] 2 A. C. 279.

(H. of L.) *Attorney General* v. *DeKeyser's Hotel*, [1920] A. C. 508.

(C. of A.) *Elliott Steam Tug. Co.* v. *Shipping Controller*, [1922] 1 K. B. 127.

(C. of A.) *John Robinson & Co.* v. *The King*, [1921] 2 K. B. 183.

(C. of. A.) *Danish Bacon Co.* v. *Ministry of Food, supra.*

(C. of A.) *A & B Taxis, Ltd.*, v. *Secretary of State for Air*, [1922] 2 K. B. 328.

Newcastle Breweries, Ltd., v. *The King*, [1920] 1 K. B. 854 (later overruled).

Brooke v. *The King*, [1921] 2 K. B. 110.

IF IN ANSWER TO WHAT HAS JUST BEEN SAID THE CONTENTION IS MADE THAT PARLIAMENT IS UNFETTERED BY ANY CONSTITUTIONAL RESTRAINTS AND THEREFORE MAY CONFISCATE AT ITS WILL THE PROPERTY OF THE CITIZEN, THE REPLY IS THAT THE PRINCIPLE OF ALLOWING JUST COMPENSATION FOR PRIVATE PROPERTY TAKEN FOR PUBLIC USES IS AS DEEPLY IMBEDDED IN ENGLISH AS IN AMERICAN LAW.

This matter was set at rest by the unanimous decision of the House of Lords on May 10, 1920.

Attorney General v. *De Keyser's Hotel*, [1920] A. C. 508.

The syllabus reads in part:

> The Crown is not entitled as of right, either by virtue of its prerogative or under any statute, to take possession of the land or buildings of a subject for administrative

> purposes in connection with the defence of the realm without paying compensation for their use and occupation.

The various opinions that were rendered contain an interesting historical review of the authorities covering many centuries.

A comment on this case in 33 Harvard Law Review, 714, reads in part:

> At all events, the constitutional significance of the court's struggle to bring the statutes and regulations into harmony with English tradition and English ideas of fair play is brought out by the fact that the result finally reached is in the spirit of our Fifth Amendment: "Nor shall private property be taken for public use without just compensation."

IF IT SHOULD BE SUGGESTED THAT THESE ENGLISH ACTS AND REGULATIONS INDICATE THAT IN THEIR ABSENCE MARKET VALUE WOULD BE CONTROLLING AND THEREFORE DISCLOSE THE NECESSITY OF LEGISLATIVE INTERFERENCE IN ORDER TO CHANGE THE CUSTOMARY METHOD OF DETERMINING COMPENSATION, THE REPLY IS THAT SUCH AN INFERENCE IS ALTOGETHER INADMISSIBLE.

It will be noted that the first statute that was passed, the amendatory act of 1915, prescribed that the measure of compensation should be the *fair market value*. The later acts and regulations which have been cited prescribe in effect that in determining compensation market prices, while they may be considered, shall *not necessarily be controlling*.

These later acts and regulations accordingly give no basis for the inference that in their absence market prices would control. If that were so, then the passage of the amendatory act of 1915, which prescribed fair market value as the basis of determining compensation, would give rise to the inference that if that act had never been passed, the courts would have adopted an entirely different test.

The essential thing to be borne in mind is that these acts and regulations, in prescribing the principles to be followed in determining compensation, merely evince an intention on the part of the law-making body to do justice—justice to the owner as well as to the public. When the act of 1915 was passed Parliament evidently thought that justice was to be obtained by giving the owner whose goods were taken compensation as measured by fair market value. But conditions became radically changed as the war progressed. It then became universally recognized that if market value should alone control, a glaring injustice might be done the public, which would be compelled to pay for articles requisitioned for war purposes out of all proportion to what the owner was in justice entitled to.

The fundamental aim of all courts is to administer even-handed justice. And if this court is convinced that the application of the market value rule in determining the compensation to be paid for the coal in question will result, as we think it will, in a

gross injustice to the public, it ought not to hesitate to apply a different principle which will be eminently fair to the plaintiff and the public alike.

Of course, if the dictum [16] in *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, is allowed to stand, it is obvious that the government must look to the courts, and to the courts alone, for relief against an oppressive rule of damages totally unsuited to the circumstances which this record discloses.

IT IS TO BE NOTED THAT IN THE VARIOUS STATUTES ENACTED BY CONGRESS AUTHORIZING REQUISITIONING AND PRESCRIBING COMPENSATION, MENTION IS NEVER MADE OF MARKET VALUE AS A BASIS FOR COMPENSATION. IN FACT, IN THE ONLY INSTANCE WHERE THAT TERM IS EMPLOYED, CONGRESS EXPRESSLY DIRECTS THAT MARKET VALUE SHALL NOT BE CONTROLLING.

"Fair actual value *based upon normal conditions* at the time of taking . . . or . . . the fair charter value *under normal conditions* for such period," to be paid by the United States. (Shipping Board Act, 39 Stat. 731.)

Secretary of Navy authorized, through a board of survey, to ascertain "the actual value" of a belligerent vessel taken by the United States. Findings of the board to be "competent evidence in all proceed-

[16] It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or *even what shall be the rule of compensation*. (See criticism of this dictum in an earlier part of the brief.)

ings of any claim for compensation." (German Boat Resolution, 40 Stat. 75.)

President authorized to acquire North Island in San Diego harbor for aviation purposes, the condemnation proceedings to be conducted in accordance with California law. Upon final ascertainment of "the value," the amount shall be paid into court. (Special Aviation Act, 40 Stat. 247.)

"Fair and just" compensation for military supplies, arms, and ammunition, and for rental for plants taken possession of by the President for the manufacture of such articles. (National Defense Act, 39 Stat. 213.)

"Just and reasonable rates" shall be fixed by the Interstate Commerce Commission for priority car service, same to be paid by the Secretary of the Treasury for government service. (Priority Shipment Act, 40 Stat. 273.)

"Just compensation" to be determined by the President and paid by the United States, for any factory, mine, or plant requisitioned for the production of necessaries. (Food Control Act, 40 Stat. 280.)

"Just compensation" fixed by the President or by the Federal Trade Commission for coal and coke plants requisitioned. (Food Control Act, 40 Stat. 284.)

"Just compensation" shall be determined and paid by the President for commandeered distilled spirits. (Food Control Act, 40 Stat. 282.)

"Just compensation" to be ascertained and paid by the President for foods, feeds, fuel, and other supplies for the army and navy, or any other public use connected with the common defense. (Food Control Act, 40 Stat. 279.)

"Just compensation" to be paid by the United States for ships and materials. (Emergency Shipping Fund Act, 40 Stat. 182.)

"Just compensation" to be paid by the United States for ships and war materials. (Naval Emergency Fund Act, 39 Stat. 1193.)

"Reasonable price" to be determined by the Secretary of War, for arms, ammunitions, supplies, and equipment. (National Defense Act, 39 Stat. 213.)

"Reasonable price" for ships and war material ordered. (Naval Emergency Fund Act, 39 Stat. 1193.)

Railroads taken over by the government "shall receive as just compensation an annual sum * * * not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June 30, 1917." If the President, for designated reasons, shall find this basis of compensation "so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just." (40 Stat. 451.)

IT IS ALSO SIGNIFICANT THAT IN THE VARIOUS STATUTES PASSED DURING THE REVOLUTIONARY WAR, NONE CAN BE FOUND WHICH PRESCRIBE MARKET VALUE AS THE TEST TO BE EMPLOYED IN DETERMINING THE VALUE OF REQUISITIONED ARTICLES. THESE STATUTES ARE OF IMPORTANCE IN DETERMINING THE MEANING OF "JUST COMPENSATION" AS USED IN THE FIFTH AMENDMENT.

The various colonial statutes are collected in Clark's Emergency Legislation, pp. 228 to 989. Virginia, for example, in 1781, enacted this significant statute:

> Whereas great abuses have happened and may happen both in the inequality of the prices and the exorbitancy of the sums at which provisions to be impressed for the use of the army shall be appraised; *Be it therefore enacted*, That so much of the laws heretofore in force or which have passed during the present session of assembly, as relate to the valuation of any provisions so impressed, are hereby repealed, and in lieu thereof, *It is enacted*, That the governor and council be empowered to fix from time to time a *reasonable* price in specie for all of the said articles, etc. (Clark's E. L., 984.)

Connecticut, in 1778, enacted this statute dealing with the prices to be paid for certain requisitioned articles:

> That all woolen cloths, blankets, linens, shoes, stockings, hats, and other articles of clothing suitable for the Army, heretofore imported, which are or shall be seized and

> taken by order of authority, for the use of the Army, shall be estimated at the rate of one dollar continental currency for each shilling sterling, prime cost of such goods in *Europe*, with the addition of the stated allowance for land carriage, if any there be, to the place where taken; and in case the prime cost of any goods imported from foreign parts can not be ascertained, the same shall be estimated by the judgment of two skilful, judicious, and disinterested men, under oath. (Clark, E. L. 235.)

Pennsylvania, in 1778, enacted a somewhat similar statute. After reciting that "Whereas notwithstanding the large quantities of clothing which have been seasonably ordered from Europe for the armies of the United States of America, adequate supplies have not yet been imported," and after making provision for the appointment of commissioners with power to collect, seize, and take designated articles for the use of the army, goes on to provide:

> That the owner or owners of the goods, wares, and merchandise before enumerated, and other articles of clothing, shall exhibit and deliver to the commissioner seizing such goods, wares, merchandise, and clothing a true account on oath or affirmation of the *original prices which they cost him* and of the incidental charges thereupon. And the commissioner aforesaid shall appoint four honest, judicious, and reputable housekeepers of the neighborhood, who may add thereto any sum they may think *reasonable* for the advancing the money for and the care and trouble of such owner

about such goods, so as the same do not exceed twenty per cent thereupon. (Clark, E. L., 717.)

It can not of course be controverted that these colonial statutes may be examined for the purpose of throwing light on the meaning of the Constitution.

The Selective Draft Law Cases, 245 U. S. 366.
Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 429.
Rhode Island v. *Massachusetts*, 12 Pet. 657.

THE PRINCIPLE WE CONTEND FOR FINDS SUPPORT IN THE RULINGS OF THE COURTS AS TO THE MEASURE OF DAMAGES TO BE APPLIED WHERE HOUSEHOLD GOODS OR ARTICLES OF PERSONAL WEAR ARE CONVERTED. SUCH GOODS ARE BOUGHT AND SOLD AT SECOND-HAND STORES, AND IT THEREFORE CAN IN TRUTH BE SAID THAT THEY HAVE A MARKET VALUE. BUT THE INJUSTICE OF APPLYING MARKET VALUES UNDER THESE CIRCUMSTANCES IS OF COURSE APPARENT.

Household goods which were stored at the defendant's warehouse were converted. The court, in commenting on the rule of damages, said that the *market value* of the goods was *not* the test, but the value to the owner based on his actual money loss was the true measure.

Lake v. *Dye*, [1921] 232 N. Y. 209.

A valuable foot note on this case in 22 Columbia Law Review, 455, reads in part:

In this field of the law, damages are intended only as compensation, i. e., an amount

sufficient to put the injured person in as good a position as if the act had not been done. If the property has a market value, the awarding of the price as damages is intended to enable the injured party to purchase goods identical in nature with the property converted, and thus put himself in the same position. But it is frequently true, as in the instant case, that the market price would not be a reliable means of determining what damages would so compensate. The second-hand value of household goods, for example, is so far below the cost price of new goods that the owner, who perhaps can not use or will not buy secondhand goods, is not fully compensated by the market price. On the other hand, to give him the cost price of new goods does not take into consideration the depreciation due to the use of the goods, and is, therefore, not a correct measure of his loss. Or, even where the market price is ordinarily used as a base for estimating damages, as in the case of a contract to sell a chattel, where the damages are the difference between the market price and the contract price, the market price may in a particular instance be unduly inflated, and therefore, if used as a conclusive measure, would operate to give one of the parties an undue advantage. Or, as frequently happens, the property may have no market value at all, as in the case of family portraits, or a set of building plans. In these cases the market price clearly can not be utilized to determine what sum will compensate the plaintiff. In the last analysis,

> therefore, market price is nothing more than evidence of the amount to which the injured person is entitled. If such evidence does not, for any reason, correctly indicate what amount will compensate, there should be no hesitancy in discarding it; this the courts have done.

The principle we contend for is also illustrated by *Suburban Land Co.* v. *Arlington*, 219 Mass. 539. It was held that "boom" prices were not proper to be considered in determining the value of lots sought to be condemned, the court saying:

> And, as a test of value, we are not inclined to say that the price which is established artificially and temporarily by booming methods should be regarded as equivalent to the market value which is regulated by the natural laws of supply and demand.

It is worth while in this connection to call attention to a ruling of Attorney General E. R. Hoar in 1869. A company owned a turnpike in Kentucky, over which, during the rebellion, large numbers of horses, mules, and wagons belonging to the United States, employed in transporting military supplies, were driven; and for this use of the road the company was allowed and paid by the War Department one-half of the rates of toll as established by the laws of the state. The turnpike company, however, claimed that it was entitled to full rates of toll—a claim not unlike that which the plaintiff now makes in this case. The Attorney General ruled that the use of the turnpike was not a taking of property within the constitutional sense, and that its owner

was in no different position from the owner of land on which a battle is actually fought. But upon the hypothesis that the owner was entitled to just compensation, the Attorney General discussed the measure of recovery in these words:

> If the company is entitled to full compensation, it is only entitled to such an amount of money as will compensate it for the whole use of the road from 1861 to 1865, which is to be determined by the whole amount of damage suffered by the company, and *not by any legislation of the State of Kentucky*, which has fixed tolls which may be just for ordinary travel but greatly more than is necessary for full compensation to the company when the road is used for the transportation of the supplies of a large army. 13 Op. Atty. Gen. 112.

WE THINK THAT THE PRINCIPLES LAID DOWN IN THE FOLLOWING CASES SUPPORT OUR POSITION.

Kountz v. *Kirkpatrick*, 72 Pa. St. 376.

Johnson-Brinkman, etc., v. *Wabash Ry. Co.*, 64 Mo. App. 590.

See also *2 Sutherland on Damages* (4th ed.), p. 1438.

THE CONDITIONS DURING THE TIME IN QUESTION WERE SO ABNORMAL THAT IT CAN NOT IN FAIRNESS BE SAID THAT THERE WAS A FREE AND UNRESTRICTED MARKET.

Upon this subject the witnesses were divided. Carpenter for example when asked if the market

was a speculative one replied: "I would not so consider it; the supply and demand caused the market price" (60). He later repeated the same thing (65). He added that one of the reasons for high prices was the demand from abroad (60). He denied that the congestion of ships at Hampton Roads and other places was a contributing factor, saying that "The congestion of ships was caused by the congestion of railroad transportation." And when asked whether the longer the ship waited the higher the demurrage was, he answered: "I presume that they accrued the demurrage;" also adding that this might have been one of the factors for high prices, although he thought that prices were predicated more on railroad transportation (60). "The capacity of the mines was far beyond the car supply. They could have produced twice as much coal as the car supply would permit" (61). In answer to the court he said that supply and demand plus transportation determined the market (61). As showing how coal producers took advantage of the necessities of European buyers during this critical period, this question and answer is full of significance:

> Q. What was the difference between the price of spot coal in the month of May, export, and, what do you call it—inland rail market?
>
> A. Yes; I will answer that question by saying that the domestic consumers, suppliers, generally, did not charge their trade, their old trade, more than a reasonable—I would not

say a reasonable price but *a much lower price than we were getting for export* (64).

Moon, on the contrary, said that transportation had nothing to do with the extremely high prices prevailing in August, 1920. "Transportation to Hampton Roads in the month of August was normal, or a little better than normal, from the tonnage figures" (73). It was the strong demand for export coal that increased the price (73).

Routten thought that there was a shortage of coal in August, 1920 (87). When asked whether the amount of coal that might be used for the trade was subject to restrictions, he replied: "Yes; about that time there was a certain percentage from each pier had to go coastwise; I think *as high as twenty-two per cent from certain sources.* Of course, that included the New River pools 1 and 2; it included all the pools" (88). When asked if this did not necessarily affect the prices for export coal, he answered: "Well, it *naturally limited the supply,* and simultaneously with that was the demand on the other side, which was about at its peak, because there were so many buyers in this country. Every day we were having people coming into our office representing firms on the other side trying to buy coal" (88).

When Bryan, the editor of a coal trade journal, was on the witness stand to testify as to market prices, he naively said: "I do not want to pass as a moralist, but if you want to put me on record

I will say that at times *I thought the prices were too high*. We are suffering to-day from high prices. I was paying $125 for a suit of clothes that I did not want to pay, that I had to pay. * * * I paid $125 for a suit of clothes in New York, and I went to London and bought this suit that I have on for $47, which I regard as a better suit" (92).

Whereupon the court took occasion to repeat the views which it tenaciously, and as we think improperly, adhered to at every stage of the trial;

> Now, gentlemen, I think with all due respect to the government of the United States, that the fallacy of the position taken is illustrated by the examination of this witness (92).

Coming now to the government's witnesses, Howe, after first explaining his connection with what is known as the Tidewater Coal Exchange, which was an association of shippers and railroads formed under the Council of National Defense and afterwards used by the Fuel Administration as one of its pieces of machinery for distribution (93–4), said that he was appointed as an agent of the Interstate Commerce Commission on June 24, 1920, to administer service order No. 6 (94). When asked what this was, he replied: "That was an order restricting the delivery of coals in an effort to furnish New England with a proper supply of coal and *restricted the exportation until a proper supply had been furnished*" (95). This order, he said, was superseded on August 2 by service order No. 11, which continued in

effect until September 17, 1920 (95). He went on to say "that the restrictions from October 1 to March 1 placed by the so-called central coal committee under the terms of the direction of the Fuel Administrator *prohibited the exportation of coal except such coal as was produced in excess of domestic needs*" (97). When asked what were the restrictions after the ban of the Fuel Administration was lifted, he said: "During the months of March and April the restriction on exportation of coal was placed in the hands of four gentlemen who undertook to carry out practically the same idea and *only allowed surplus coal to be exported*" (97). This, he said, tended to keep a larger supply for domestic use and in this way the market price for *domestic* coal was kept down. But no attempt, he said, was made to keep the price of *export* coal down; "no consideration of the appraisal of export coal was given at all" (97). When asked what other restrictions there were, he said: "Then the restriction under the Interstate Commerce order No. 6, of June 24, which had to do with furnishing the cars for loading coal. The carriers were directed not to furnish cars to any man for any purpose * * * other than domestic until all domestic orders had been fulfilled. That order did not accomplish quite what they thought it would, and it was modified on August 2, or effective August 2, by service order No. 11, in which it was estimated what the New England territory needed in particular, and a definite percentage of the coal produced in each district was furnished the railroads which *must be fur-*

nished to New England by tidewater" (97, 98). When asked if these restrictions affected the price of coal for export at Hampton Roads, he answered "only in so far as it made coal less available" (98). No restrictions, he said, were placed "except as to the limitation of quantity" (98).

During the time these restrictions were placed on the quantity of coal to be exported, he said that there was a considerable congestion of vessels "in Hampton Roads as well as other ports awaiting coal, and there was a considerable shortage of coal as we viewed it. During the first period we did have a miners' strike, which I think lasted from November 1 to December 12, 1919; which was followed by a severe winter, interrupting transportation conditions. That made *it necessary to continue the restrictions as long as the weather continued.* Then that was followed by the railroad labor strikes, the switchmen's strike, which brought us up to another shortage, the demand being constantly greater than we could supply on the export coal" (98). All of these things, he said in answer to the court, tended to increase the price of export coal. When asked if the transportation facilities were normal in August, 1920, and whether the supply of coal was normal at Hampton Roads, he said that he could not answer inasmuch as he was not in charge of Hampton Roads that month, but "from that territory serving Baltimore we were in fairly good condition from a transportation standpoint in August, though we *still had the restrictions and trying*

to get sufficient coal to New England" (99). He said, in answer to the court, that there was always a demand for export coal at Hampton Roads "and some sort of a supply," but the prices fluctuated according to whether the demand was greater on one day or another, and that supply and demand were the controlling factors (99). When asked what he meant by supply and demand, he replied: "Vessels calling for the amount of coal that was there or calling in for an excessive amount of coal more than they were able to furnish them" (100). He added that coal was very high during this period and that this "was common knowledge." The price began to decrease the latter part of September when the supply was getting greater than the demand; "the exports fell off very materially about that time" (100).

When Commander Cobey was on the witness stand the government offered to prove by him (*inter alia*) that the market at Hampton Roads "was a *purely speculative market* and did not in any way represent the reasonable value of the article itself." The government also offered to prove that in February, 1919, the plaintiff furnished figures showing that in 1918 its average cost of producing coal was only $2.79 (104). But the court sustained an objection (105), under an understanding that the government should have an exception (103). The facts stated in the offer of proof must, however, for the purposes of this record, be taken as true; and the cost of $2.79 in 1918 is sufficiently close to the period in question to justify a presumption that this figure continued

to represent the cost. The fact therefore that this company, which was able to produce coal at only $2.79, was nevertheless able to get as high as $16 a ton, serves forcibly to accentuate the government's contention that the market was *not a free and fair market*, and accordingly ought not to control.

The court, however, as its various rulings indicate (85, 86, 109, 115, 120), thought that so long as there was a market, it made no difference whether the market was a fair and free one.

The court finally turned to government counsel and inquired: "Now, has the government any proof that there was not a market?" (109). Thereupon the government proceeded to interrogate Commander Cobey upon this subject, when the court, somewhat impatiently, proceeded to question the witness:

> Q. Is there a market for coal at Hampton Roads?
>
> A. There is a free market now; yes, sir.
>
> Q. There was a market all along, was there not?
>
> A. A restricted market existed.
>
> Q. What restricted it?
>
> A. The restrictions on the spot market was principally the very small quantity of coal that was at hand as compared with the demand.
>
> Q. Is not that always a restriction where the supply is low and the demand is great?
>
> A. Yes.
>
> Q. The coal was bought and sold, was it not, at Hampton Roads during all this period?
>
> A. Well, irregularly.

Q. But it was bought and sold during the entire period, was it not?

A. It was, but not in the same way that coal is ordinarily bought and sold.

Q. Not in the same manner as it had been, but it was bought and sold during that period, was it not; that is, the period of the coal in suit?

A. Well, it was, of course, bought and sold, but there were many times when there were no sales.

Q. Because there was no coal?

A. Yes.

Q. But when it was bought and sold it was bought and sold in a market, was it not?

A. Yes.

Q. And when it was not sold it was because a supply was not there?

A. That, and, your honor, I was going to say the restrictions of the various governmental agencies regarding transportation to New England and the Great Lakes, as I believe was testified to yesterday.

Q. They affected the supply, did they not?

A. They affected the supply; yes, and the distribution (113, 114).

The court proceeded to interrogate the witness as shown at pages 116–118. He testified that he had no reason to doubt that the individual sales mentioned by the plaintiff's witnesses were in fact made. At page 120 he said: "Markets did exist during that whole period but at times during that period there was no market." A disagreement arose as to what the witness really meant. The court took him in

hand again, and the witness reiterated that spot coal was bought and sold at Hampton Roads except when there was no available supply. He then proceeded to explain the causes for this lack of supply: "The causes were that the coal was already covered by contract, the principal cause; there was very little free coal because of the shortage of production. The shortage of production was due to the railroad conditions primarily, and during that time, the month of November and the latter part of October, 1919, there was a very serious miners' strike and the switchmen's strike in April, and the orders of the Interstate Commerce Commission to divert coal inland to the Great Lakes, and the hard winter of 1919–1920, all of those caused the supply of free coal to be very limited" (123).

The court then continued its examination:

> Q. Where men testify here that there was a market price on certain days, was there anything in their testimony which would lead you to believe that the prices which they named were not market prices?
>
> A. Yes.
>
> Q. Can you fix any dates which were given with the amounts of prices testified to which, in your judgment, were not the market prices for coal on those days?
>
> A. I could not state that, in our opinion, any of these very high prices were the market prices.
>
> Q. Annexed to the complaint is a schedule showing the dates when coal was taken, show-

ing the fair market value as the plaintiff has testified to it here in court. Have you examined those schedules?

A. Yes.

Q. Now, in what particulars, what precise statements made in those schedules are incorrect?

A. In that they do not represent what the petition calls for, a fair market value (123,124).

Whereupon the court, apparently greatly dissatisfied with the answers the witness had given in response to these questions which the court itself had put, made this remarkable ruling, to which the government duly excepted:

> You better strike all of this evidence out, every bit of it; it is entirely irrelevant and incompetent (124).

Finally, the witness was asked by government counsel: "In your opinion was there a free market for the sale of coal from September 19th to January 21, 1921, for the grade of coal involved in this suit?" But the court would not let the witness answer, the government again excepting (124).

IN THIS CONNECTION THE FACT SHOULD NOT BE OVERLOOKED THAT ALTHOUGH THE ARMISTICE HAD BEEN SIGNED, THE COUNTRY WAS, IN A SENSE, STILL AT WAR DURING THE PERIOD IN QUESTION, WITH ALL THE VIOLENT DISTURBANCES OF THE MARKETS WHICH WAR INEVITABLY PRODUCES.

Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146.
Ruppert v. *Caffey*, 251 U. S. 264.

INASMUCH AS THE DEFENDANT IN ERROR CLAIMS THAT THE GOVERNMENT'S CONTENTIONS HAVE BEEN REPUDIATED BY DIFFERENT FEDERAL COURTS, WE PRODUCE THE VARIOUS FEDERAL CASES DEALING WITH THE AMOUNT OF COMPENSATION TO BE PAID FOR ARTICLES REQUISITIONED UNDER THE LEVER ACT.

National City Bank v. *United States*, 275 Fed. 855; aff., 281 Fed. 754 (coffee).

C. G. Blake Co. v. *United States*, 275 Fed. 861 (coal).

Our second main proposition is that even if we are wrong in maintaining, under the circumstances disclosed by this record, that market prices are not controlling, the court nevertheless committed error in refusing to admit evidence as to domestic market prices and in holding that spot export market prices alone control.

A SHORT REVIEW OF SOME OF THE TESTIMONY IS FIRST NECESSARY TO A FULL UNDERSTANDING OF THIS SUBJECT MATTER.

Carpenter testified that the coal which the government requisitioned was all intended by his company for export or for bunkers, and this was the reason why his company was claiming the export as distinguished from the domestic prices (38, 43, 44, 48, 59, 66, 68). His company could have sold, he said, all the coal for export (43, 44, 66, 68). This testimony, we may add, was uncontradicted *except* as it may have been contradicted or explained by other testimony which this witness himself gave and which we shall now notice.

He said that his company was engaged *principally* in the export business, and during the period in question exported 551,000 tons (38). The coal in question, he added, that was shipped to Hampton Roads, was intended for export and bunkers (38). The reason he claims the export price rather than the domestic is because his company was in those days engaged in the export business (43). "That was the business we were engaged in; *we had no other business*" (50).

His company produced about 1,000,000 tons a year from the four mines which it owns (46). Having, as we have just seen, testified that his company was engaged exclusively in the export business, it is somewhat singular that Carpenter should testify that his company had three contracts for domestic business (51) amounting to 3,000 tons a month (52). "The balance was coal sold inland, sold at a time when there was an irregularity in transportation and was sold on the market" (52). Then comes this significant testimony:

> Q. And necessarily the irregularity of transportation caused an irregularity in the market, did it not?
>
> A. No, sir; not in the case of the inland, because we had not advanced the prices on our customers inland for obvious reasons.
>
> Q. You only advanced the price on the export trade?
>
> A. Correct; because we wanted their money (52).

His company was selling about 907,000 tons a year, 610,000 of which went into the export trade (52–3). Of the 907,000 tons about 36 per cent was contract coal and about 33 per cent spot coal (53). In other words, about 600,000 tons were exported or furnished for bunkers under either spot or contract arrangements (58). "As I said to you before, there was 33 per cent spot, about 36 per cent of contract, export and bunkers, and that would leave about 31 per cent coastwise and inland" (59).

It will thus be seen that there is remarkable confusion, if not, indeed, outright inconsistency, in the witness's testimony. At one place he says that his company was engaged exclusively in the export business, and the reason he is seeking to collect export prices from the government is because all of this coal could have been sold as spot in the export trade. At another place he says that 30 per cent of his company's annual production was used in the domestic business—coastwise and inland. Of the balance, all of which went into the export and bunker trade, 36 per cent was contract coal and 33 per cent noncontract coal.

At this juncture we now turn to Carpenter's definition of contract and spot coal. Spot coal is a tidewater term and means coal that can be demanded within three or four days; in other words, for almost immediate delivery (35). Contract coal, on the other hand, is coal contracted for in advance, delivery to be made in designated amounts throughout the life of the contract (35). April is

the month when these contracts for domestic coal are usually entered into, but this is not true of contracts for bunker or export coal (51). By bunker coal is meant coal intended for a ship's bunker (47). The ship is usually a foreign vessel, although not infrequently ships belonging to our own merchant marine are included in the term (48-9). Dr. Garfield said that bunker coal for foreign vessels should be considered as export coal, and he also ruled that bunker coal for American vessels going to foreign ports should likewise be treated as export coal (68).

The sporadic and uncertain supply of spot coal is indicated by this important testimony which Carpenter gave:

> Q. When these shipments were made to Hampton Roads, Mr. Carpenter, did you have charterers in all cases ready for reshipment or not?
>
> A. I would like to explain this, that a coal producer usually making these contracts figures on what the car supply is going to be. Well, if it so happens he gets a larger supply than he figured on he will have some free coal. In another case we sell coal on a certain contract. The steamer is located to arrive on a certain day in a certain month. By storms it is delayed on its route and it may be seven days late. Well, a cargo is at the port provided and by a seven days' delay in the vessel you have time to reship from the mines, consequently you sell the coal in order to relieve

the cars and take advantage of the spot market.

Q. *And those were the spot sales you mentioned?*

A. *Yes, sir* (67).

It will be seen from this that when the coal in question was shipped by the plaintiff from its mines, it was then not known whether it would later become spot coal or not. That depended altogether on unforeseen contingencies. The coal was shipped in the first instance because of the plaintiff's contracts to sell coal for future delivery. If, on the coal's arrival at Hampton Roads, it should be ascertained that the vessel for which it was intended was not there to receive it, the coal would be sold in the spot trade, provided there was sufficient time to send the cars back to the mine for reloading and reshipment by the time the vessel was expected to arrive. Or if it should happen that the company got a larger car supply than it anticipated, it would avail itself of the surplus for shipping what is designated as free coal in contradistinction to contract coal. It would therefore appear that the testimony which this witness gave to the effect that *all* the coal which the government requisitioned would have been sold in the market as *spot* coal is not true, or at the best is true only in part.

Commander Cobey testified that of the total amount of coal distributed at Hampton Roads only 10 to 20 per cent represents spot coal (114). This testimony was uncontradicted.

THE DIFFERENCE IN THE PRICE OF EXPORT AND DOMESTIC COAL.

Of the coal that is distributed through Hampton Roads, Carpenter said that the quantity for domestic use, outside of that part which goes to New England, is not great (47). New England paid almost as much as was charged for export and bunker coal (61). When asked the difference between the export and what he designated as the inland all rail market, he replied that the latter was much lower (64). When asked what was the difference between the export and the domestic price, he replied that it varied materially—that it might be as much as $1.50 (64). The Fuel Administrator fixed a margin between the two of $1.50 (64). The price which the plaintiff is seeking to recover for the coal taken during the period the Fuel Administrator fixed the price, is the export price (68).

Moon said that there was no difference in prices at Hampton Roads between spot domestic and spot export coal (81), but he later qualified this by saying that what he meant by spot domestic was coal transported by barges to New York, adding that it made no difference in the prices he had to pay whether the coal he bought went abroad or went to New York or New England (82).

Routten said that the price fixed by the Fuel Administrator for export coal was $4.53, and that for domestic coal was around $3.25 or $3.50 (86).

Howe said that in consequence of the restrictions which he spoke of, the market price of coal for domestic use was kept down, but that this was not true of export coal (97).

The government offered to prove that the prices for spot domestic coal were much lower than the prices for spot export (104) but the court would not permit this (105), there being an understanding that the government should have an exception (103). The trial court's views are summed up in these three sentences uttered during the trial: "I think that the purpose of that is to show that the market price for spot coal was at such and such a price and that they are entitled to the price in the best market where their coal could have been sold. In other words, their just compensation is measured by the best price that they can obtain. And so, unless you are controverting the existence of the spot market I do not see that that is an issue." (115).

The government also endeavored to introduce testimony as to the price of contract coal (50–51; 53–58; 103–4) but the court would not permit this to be done.

THE TRIAL COURT WAS WRONG IN REJECTING PROOF OF THE MARKET VALUE OF DOMESTIC COAL.

The trial court, as we have just seen, took the position that just compensation was to be measured "by the best price" the company could have obtained (115). It is of course important in this connection to bear in mind that the company did *not* in the first

instance ship its coal to Hampton Roads for the purpose of there selling it as spot export coal. On the contrary, it was shipped by the plaintiff in fulfillment of contracts it had already entered into, and the government was not permitted by the court to prove the contract value. The theory of the plaintiff is that because the government disabled it from fulfilling these contracts to the extent that the coal was requisitioned, the government must therefore pay at the export market rate, however much that rate may depart from the contract rates, and notwithstanding the fact that the export market rate is higher than the domestic. The trial court adopted this view, apparently under an entire misconception of the principles announced in *Boom Co.* v. *Patterson*, 98 U. S. 403.[17]

Because there may be two markets, one export and the other domestic, it by no means follows that *just* compensation demands that the higher market *must* control. Such a doctrine was in effect repudiated in *Shipping Controller* v. *The Lloyd Royal Belge* (*Ltd.*), 36 The Times Law Reports, 97. There the British government had requisitioned a ship under an agreement to pay its "ascertained value" in the event of nonreturn. The ship was destroyed by enemy action, and the owner, a neutral, was unable to replace it in the British market because of the war restrictions then prevailing. The only place therefore where he could replace it was in a

[17] This case has been limited and explained by *McGovern* v. *New York*, 229 U. S. 363. See also *New York* v. *Sage*, 239 U. S. 57.

neutral market, where the cost would have been three times as great as a similar vessel was then worth in the British market. In repudiating his contention that he was entitled to this larger sum, the court said (p. 98):

> The ascertained value of the vessel, found to be £111,000, is the utmost the owners would have been able to obtain for her had they been British subjects, and I can not think that they are entitled to get three times as much because they are not British subjects. In effect, the owners claim a very large sum of money, not because it is the ascertained value of the vessel, but because it is the ascertained value of some other vessel—namely, a similar vessel in the neutral market.

The question is not the value of the article for a particular use, but the market price; and if there is more than one market price, depending on where the coal is to be used, the jury ought not to be limited to the higher but should be at liberty to consider both. Especially is this true in a case where, as here, the uncontradicted proof shows that only *10 to 20 per cent of the coal handled at Hampton Roads was spot export coal.*

This principle is exemplified in *Railraod* v. *Nichols*, 24 Kan. 242. There the railroad was sued for the killing of a cow, and the question was presented whether its value should be determined by its market value for breeding purposes or its market value for beef. It was held that its value for all purposes

should be considered, and that it was for the jury to say in the light of all the testimony what its real market value was.

WE SUBMIT THAT THE GOVERNMENT SHOULD HAVE BEEN PERMITTED TO SHOW MARKET VALUE AS DETERMINED BY THE CONTRACT VALUE.

A somewhat similar question arose in *Burr's Ferry, etc.* v. *Allen*, 149 S. W. (Tex.) 358, which was a suit to recover the value of logs which were lost because of obstructions placed by the defendant in a river down which the logs were being floated. These logs, as the testimony showed, were never sold for cash but always on time; and the question was presented whether this was enough to establish market value. In holding that it was the court said (p. 361):

> We think this was a sufficient showing of the market price of logs at Beaumont at that time. The fact that buyers at that time were not paying cash does not show that the logs had no market value, and we think the amount agreed to be paid for the logs by the buyers generally in said market should be taken as their market value at that time.

The admissibility of this testimony is rendered all the clearer when it is borne in mind that the government offered to prove that the plaintiff, prior to the time the coal was actually taken, was given timely notice of when the government would need the commodity, thereby avoiding any interference with the plaintiff's normal operations (104).

TO SAY THAT THE HIGHER PRICE ALONE CONTROLS IS TO RUN COUNTER TO THE WELL ESTABLISHED RULE THAT WHERE A STOCK OF GOODS IS CONVERTED, THE MEASURE OF RECOVERY IS THE WHOLESALE AND NOT THE RETAIL VALUE.

1 *Sedgwick on Damages* (9th ed.) §248a.

TO SAY THAT THE EXPORT PRICE IS THE SOLE TEST OF VALUE IS TO LOSE SIGHT OF THE VERY PRINCIPLE UNDERLYING THE RULE GOVERNING THE ADMISSIBILITY IN EVIDENCE OF MARKET VALUES.

The very purpose of introducing evidence of market value is because it reflects what the public thinks is the value of the given article. Accordingly, if the American public place a value upon coal as represented by what they are willing to pay for it in the market for domestic consumption, the value thus fixed certainly affords *some* evidence of what the coal is really worth. Assuredly the value which the American people are willing to pay for coal for their own needs affords a much safer guide in determining what is just compensation than the price which Europe is compelled to pay in our markets in order to obtain temporary relief from the unfortunate conditions which the war brought about.

It may not be the only evidence which should be introduced to enable the jury to render a just verdict. But we respectfully submit that to exclude it from the jury's consideration altogether on the theory that it has no probative value in determining what is just compensation, is wholly unwarranted.

IT IS NO ANSWER TO THIS TO SAY THAT IF THE COAL HAD NOT BEEN REQUISITIONED THE OWNER COULD HAVE OBTAINED THE SPOT EXPORT PRICE, AND THAT JUSTICE ACCORDINGLY DEMANDS THAT THE PLAINTIFF SHOULD BE PUT IN THE SAME POSITION IT WOULD HAVE BEEN IN IF THE GOVERNMENT HAD NOT SEIZED THE COAL.

In the first place it is not true, as we have heretofore pointed out, that the owner intended to sell this coal in the spot export market. It is true that Carpenter testified that this coal when shipped from the mines to Hampton Roads was intended for *export and bunkers* (38), but nowhere throughout the entire record does it appear that the coal was intended for the *spot export market*, unless in those exceptional instances where the carrier happened on some particular occasion to furnish cars in excess of what had been ordered. On the contrary, as we have heretofore pointed out, it was shipped in the first instance for the primary purpose of fulfilling contracts for the export and bunker trade; and whether it would ever become free coal available for disposition in the spot export market depended altogether on adventitious circumstances.

But entirely aside from this, the law does not, in assessing damages, aim to put the owner in *exactly* the position he would have been in if no interference with his property had taken place. Thus, for example, if A converts the property of B worth in the market only $100, B can not recover of A $200 because C

was under a contract to take the property from B at the latter figure.

Woonsocket M. & P. Co. v. *N. Y., N. H. & H. R. Co.*, 239 Mass. 211.

Cf. Williams Bros. v. *Agius, Ltd.*, [1914] A. C. 511.

IN ANY EVENT THE COURT WAS ALTOGETHER WRONG, WE RESPECTFULLY SUBMIT, IN HOLDING THAT DURING THE PERIOD THE PRICES FIXED BY THE FUEL ADMINISTRATION PREVAILED, THE GOVERNMENT MUST PAY ACCORDING TO THE EXPORT AND NOT ACCORDING TO THE DOMESTIC PRICE.

As we have already seen, the Fuel Administrator fixed the price of export coal at $4.536 (42). The price, however, fixed for domestic coal was $1.50 lower (64); or in other words, about $3.25 or $3.50 per ton (86). Dr. Garfield ruled that bunker coal for foreign vessels should be considered as export coal, and also ruled that bunker coal for American vessels going *to foreign ports* should likewise be treated as export coal (68). Assuredly it can not be said that the Navy's vessels fall within this rule. Even if it could be said that vessels belonging to the Navy, if destined for foreign ports, fell within Dr. Garfield's ruling, no proof upon this subject was ever introduced.[18]

[18] Singularly enough, Dr. Garfield's order of February 25, 1918, exempts in explicit terms naval vessels from export prices: "5. The phrase 'delivered * * * to vessels for foreign bunkering purposes,' mentioned above, is hereby held to mean coal put in the bunkers of any vessel sailing from a tidewater port for any port outside the United States and Alaska, *excepting naval vessels or Army transports.*" General Orders, Regulations, and Rulings of the United States Fuel Administration, Government Printing Office, 1920, p. 177. When the Fuel Administration was reestablished on October 30, 1919, all regulations, including the one just mentioned, were restored. See appendix to the publication just mentioned, p. 23.

It accordingly seems to us that it is little short of an outrage to say that the government, although it fixed, through the Fuel Administration, a price for domestic coal at $1.50 per ton lower than for export, must, nevertheless, with respect to its own vessels avowedly maintained for defensive purposes, pay the export price. In all candor we do not see how such a position can be defended. And yet that is just what the plaintiff is attempting to do, as indicated by this interesting passage from the record (43):

Mr. Williams:

Q. Now just explain to the court and jury why you fixed the price at $4.536, which I understand is the export price.

A. The $3.08 plus the freight rate of $2 made $5.08, and plus $1.50—let me see; I will have to get a pencil to figure that out.

By the Court:

Q. You took the export price because that was the highest price that you could sell your coal for, was it not; that is, after the government fixed its price it fixed a price for domestic use and it fixed a price for export use?

A. Yes.

Q. And you could have sold your coal for export use and the export price was higher than the domestic price?

A. Yes.

Q. So you set the higher market price, which was the export price; that is the reason for it, is it not?

A. Yes.

The judgment, it is respectfully submitted, should be reversed.

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WILLIAM D. RITER,
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FEBRUARY, 1923.

○

No. 316.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

NEW RIVER COLLIERIES COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR NEW RIVER COLLIERIES COMPANY, DEFENDANT IN ERROR.

International, 236 Chestnut St., Philadelphia.

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COUNTER-STATEMENT OF THE CASE.

This appeal is from a judgment of the Circuit Court of Appeals for the Third Circuit (276 Fed. 690), affirming a judgment of the United States District Court for New Jersey, entered upon the verdict of a jury, in three suits brought by New River Collieries Company, a New Jersey corporation, against the United States, to recover just compensation for property owned by it and commandeered by the Navy Department of United States, for its use, pursuant to authority granted by Act of Congress (known as the Lever Act) approved August 10, 1917, c. 53, 40 Stat.

276 (U. S. Comp. Stat. 1918 Sec. 3115⅛ii). Jurisdiction is conferred by Section 10 of the act on the United States District Courts to hear and determine claims for just compensation for property taken by the Government in the exercise of its power of requisition under that act. The three actions involving the same issue were consolidated for purpose of trial.

The property taken was bituminous coal, and was requisitioned at Newport News and Sewall's Point, Hampton Roads, Virginia, in various amounts, and at different times during the period commencing September 18, 1919, and ending February 1, 1921.

There is no dispute as to the quantity, quality or ownership of the property, or of the fact that it was actually delivered to and used by the Navy Department.

The Navy Department determined prices to be paid for said coal. These prices were refused by defendant-in-error as not being just compensation, and these actions were thereupon brought to recover just compensation.

There were two markets for said coal, *viz.*, a domestic market and an export market, the latter of which was higher. The business of defendant-in-error was chiefly in the export market, and the coal taken was intended for, and would readily have been disposed of in, the export market.

During the period when the property of defendant-in-error was taken there were sold in the open market approximately 36,000,000 tons of coal of the character in question. Defendant-in-error produced

about 907,000 tons, of which about 610,000 tons were sold by it in the export market.

At the trial, the defendant-in-error proved, by men of integrity and of long experience in the coal industry, and especially familiar with market prices for bituminous coal during the period in question, that numerous transactions of purchase and sale took place during such period, that there was a free and open market, that they were familiar with the market prices, stating them.

Defendant-in-error showed its own sales during the period in question to the extent of about 907,000 tons, and a schedule showing prices actually obtained therefor, which corroborated the prices claimed in this suit, and they were admitted in evidence without objection by the Government.

Excerpts from trade journals, including *The Black Diamond, Saward's Journal* and the *Coal Trade Journal,* were proved and these prices were all confirmatory of the market price set up by defendant-in-error.

The witnesses called by the defendant admitted that there was a market at Hampton Roads.

Plaintiff-in-error attempted to prove the cost of producing coal of the kind in question, plus a profit which it regarded as reasonable thereon, and this was ruled out by the trial judge.

The jury found verdicts upon the evidence of the market values, though the verdicts were lower than the market values set up by defendant-in-error and lower than the market prices testified to by any of the witnesses. Judgments were entered on the verdicts.

ARGUMENT.

The requirement of Section 10 of the Lever Act, *supra* (by authority of which the property in question was taken), that

> "The President shall ascertain and pay a just compensation therefor,"

is obviously in obedience to the mandate of the Fifth Amendment to the Constitution:

> "Nor shall private property be taken for a public use without just compensation."

That the guaranties of the Fifth Amendment are not suspended in time of war, is settled by

> *Ex parte* Milligan, 71 U. S., at p. 520, and U. S. v. Cohen Grocery Co., 255 U. S. 88 (1921).

And it is likewise not open to question that the measure of just compensation is a matter for judicial, and not legislative or executive, determination:

> "The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is *judicial*. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be

paid, and the ascertainment of that is a *judicial* inquiry."

> Monongahela Navigation Co. v. U. S., 148 U. S. 312, at p. 327 (1892).

And so, the prices arbitrarily fixed by the Navy Department in this case as compensation for the coal taken from defendant-in-error, have no binding force; and Congress recognizes the principle in its provision in Section 10 of the Lever Act for a judicial determination of just compensation at the instance of the property owner.

The answer invariably given by the courts, both Federal and State, to this question as to the proper measure of just compensation under the Constitution, is that

> **"The compensation must be a full and perfect equivalent."**
>
> Monongahela Navigation Co. v. U. S., *supra*,

and that the owner is compensated

> **"when he is paid its fair market value for all available uses and purposes."**
>
> U. S. v. Chandler Dunbar Co., 229 U. S. 53, at p. 81 (1912).

This principle that "just compensation" is the fair market value of the property at the time and place of delivery, has been so repeatedly stated and affirmed and reaffirmed that citation of all the authorities would be but a vain show of learning and wholly superfluous. Citation of some of the more important authorities,

with brief and forcible excerpts therefrom, are quoted in an appendix hereto (pp. 24 to 31, inc.).

The Government, in its brief, goes far afield in its reference to statutes passed in England and in America in colonial times. The Government must concede, however, that the absence of constitutional inhibitions in England and in America in colonial times, makes the reference far-fetched and utterly destroys the analogy. And even were it otherwise, the doctrine attempted to be inferred by the statutes cited is directly in the teeth of the principle steadfastly adhered to and uniformly applied by this court, to the effect that there cannot be **"a full and just equivalent unless the plaintiff receives from the Government as much as it might have received for its property in the open market."**

The comment of counsel for the Government on page 20 of its brief that the "principle of allowing just compensation for private property taken for public uses, is as deeply imbedded in English as in American law" is not borne out by the authority cited. In the course of the opinion of the House of Lords in Attorney General v. De Keyser's Hotel, upon which the Government relies, Lord Dunnedin (the ranking law Lord) says:

> "The King, as *suprema potestas* endowed with the right and duty of protecting the Realm, is for the purpose of the defence of the realm in times of danger entitled to take any man's property . . . **the texts give no certain sound as to whether this right to take is accompanied by an obligation to make compensation to him whose property is taken.** . . . There is a universal

practice of payment resting on bargain before 1708, and on statutory power and provision after 1708. . . . **I do not think that from this usage of payment there can be imposed on the Crown a customary obligation to pay.** . . . On the other hand, I think it is admissible to consider the statutes in the light of the admitted custom to pay, for, in the face of a custom of payment, it is not surprising that there should be **consent on the part of the Crown that this branch of the prerogative should be regulated by statute.**"

It may be conceded that the ascertainment of the fair market value may in certain cases be attended with some difficulty. The few authorities relied on by the Government are isolated, sporadic cases, some involving measure of damage in breach of contract, where under exceptional and special circumstances the market prices have been held not to be the sole evidence of fair value. Much depends upon the nature of the property taken; whether realty or personalty; if realty, whether taken as an entirety or in part; if personalty, whether the article is one which is readily saleable and freely traded in, etc., etc. In none of the exceptional cases cited by the Government was there present an actual active market.

But the present case is entirely free from any such difficulty. For, as the Circuit Court of Appeals, in its opinion below (Transcript, p. 172), so clearly points out:

"**If, further, the commodity be a staple, which, like coal, is produced for sale and consumption, not for retention and long use, the difficulty is again reduced, for in such instance the first—**

and sometimes the last—inquiry to be made in reckoning its value is its worth as an article of sale. If it be an article commonly traded in on a market and it is shown that at the time and place it was taken there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition.''

And may we not safely rest upon the finding made by the learned Circuit Court of Appeals below, from its review of the evidence (Transcript, p. 171), that

> ''The plaintiff introduced evidence which, *not being disputed*, proved that at the place and during the time the Government took the plaintiff's coal there were two markets for coal, a domestic market and an export market, the latter being the higher; that both markets were affected by war conditions still prevailing and by Government restrictions still in force, *though in both markets supply and demand were the controlling factors;* that the business of the plaintiff was chiefly in the export trade; that the export demand during the time and at the place in question was such that, but for the action of the Government in requisitioning its coal, it could have sold its coal for export at prices prevailing for spot deliveries.''

And so the jury found.

And to foreclose any possibility of doubt as to the correctness of this finding of fact, we refer to the testimony (Transcript, p. 33), that approximately 36,000,000 tons of this kind of coal was sold in the open

market, during said period defendant-in-error producing and selling 907,000 tons (Transcript, p. 52), of which latter about 610,000 tons were sold in the export market (Transcript, p. 53), and of which 268,000 tons were sold "spot" at Hampton Roads (Transcript, p. 59). Five expert witnesses for the defendant-in-error, three wholly disinterested and all unimpeached, testified that there was always a market—an eager, constant and ready demand which would have absorbed at once all of the coal of defendant-in-error (Transcript, pp. 32 to 92). And two of the Government's witnesses, in answer to the inquiry of the learned trial Judge as to the existence or non-existence of a market, testified that there was a market for this coal (Transcript, pp. 96, 113, 114). At pages 96 and 97 of the Transcript we find the following from the testimony of Joseph A. Howe, a Government witness:

"By The Court:

Q. There was a market down there at Hampton Roads, was there not?

A. Yes.

Q. Coal was bought and sold down there, was it not?

A. Yes.

Q. And prices were paid by buyers for coal and sellers received prices for it?

A. Yes.

Q. And there were a number of dealers there?

A. Yes.

Q. During all this period?

A. Yes.

Q. And the prices varied from day to day, did they not?

A. I am informed they did.
Q. To the best of your knowledge?
A. To the best of my knowledge.
Q. And they fluctuated?
A. Yes."

Again, at page 99, this same witness was asked:

"By The Court:

Q. There was no trouble about there being a market down there at Hampton Roads for export coal?

A. There was always a demand.

Q. And supply?

A. Some sort of a supply.

Q. And the prices fluctuated according as to whether the demand was greater on one day or another?

A. Yes.

Q. Supply and demand were the controlling factors?

A. Yes."

The statement prepared by the witness Carpenter and introduced in evidence is particularly enlightening. It is set forth in the appendix hereto, page 33.

The Government, however, advances the argument that "the conditions during the time in question were so abnormal that it cannot be said that there was a free market." But the only circumstances pointed out by the witnesses for the Government in this connection (besides the fact that the prices were high) were the regulations of the Interstate Commerce Commission with respect to "furnishing cars for loading coal," limiting the number thereof, and restricting the quan-

tity of coal for exportation. They were obliged to concede, however, that these regulations merely affected the supply (Transcript, p. 98), and that they did not destroy or restrict the market, but that on the contrary there was an actual market for spot coal for export or bunker purposes and active and regular trading therein during the entire period here in question. See excerpt from testimony quoted *supra*, page 8, *et seq.*

Prices of nearly all commodities were high because of the law of supply and demand and because of the effect thereon of post-war conditions. There was no suggestion that conditions at Hampton Roads were different in any respect from the general conditions throughout the United States.

It is apparent, then, that the finding of the Circuit Court of Appeals in this case (Transcript, p. 172) is a complete answer to the Government's contention:

> "Admittedly, the coal market at Hampton Roads was affected by war conditions and Government restrictions. The market there was abnormal in the sense of being different from the market before the war. While war did produce a condition where the demand greatly exceeded the supply, it was not a condition prevailing on particular days at the particular place at which the Government requisitioned the plaintiff's coal, *but was a general condition prevailing wherever coal was bought and sold.* War did not destroy the coal market; it made a market of another kind, which, though abnormal in comparison with the peace market, was firmly established and long continued. The prices at which coal was regularly sold and bought in such a market under its vicissitudes constituted, we think, valid evidence of its fair market value."

Of equal force and clarity is the answer made to a similar contention by Judge Peck in an analogous case:

> "The abnormalities of the market on which the Government relies to set aside the ordinary rule and invoke the exception are of two classes—these resulting from governmental regulation and those consequent upon unusual commercial conditions following the hostilities accompanying a technical state of war.
>
> "The fact that laws and governmental regulations affect the sale of commodities does not abrogate the settled rule that market value is just compensation. All transactions in the commercial world are more or less affected by such conditions. Tariffs, transportation regulations, and various legal restraints and restrictions are in constant operation. Neither does the fact that unusual conditions affect the market mean that there is no market or market price. Droughts, floods, commercial panics, crop failures, labor difficulties and other causes frequently affect markets seriously, but not so as to warrant a Court, when assessing compensation consequent upon the exercise of the right of eminent domain, in saying there is no market. **The effects of war may differ in degree, but so long as a market, that is, a general buying and selling of the commodity, exists, the rule persists.**"
>
> The C. G. Blake Co. v. U. S., 275 Fed. 861, 863 (1922).

The Government suggests the payment of "cost and a reasonable profit" irrespective of what the owner is able to get for his property in the ordinary course of barter and sale. But this standard of compensation is vague and impracticable of application. Would the Gov-

ernment then pay different prices to different producers for the same products at the same spot? Since costs vary, if the Government pays a uniform "cost and a reasonable profit" on some theory evolved out of the air, then some producers will either be making no profit, or a greater or less profit than other producers. It requires no special knowledge of economics to realize that certain producers are capable of more economical production than others and that it is necessary that there should be a demand at a price in excess of the cost of the most economical producer in order to bring out the volume of production. Would different prices be paid to producer and middleman? And why further strain the judicial system by requiring a determination of what is a "reasonable profit," when we have now the direct and simple standard of fair market value? And would the rule be the same when the market was depressed? Why afford the possibility of discrimination amongst citizens by taking the property of one at so-called "cost plus a reasonable profit," and allowing others, more favored perhaps by the officials having the power of requisition, to dispose of their property in the open market and to receive the full market value thereof.

In the award of the Tribunal of Arbitration, composed of the Hon. Chandler P. Anderson, Arbitrator American-British Claims Arbitration Tribunal (appointed by the United States), His Excellency, Mr. Benjamin Vogt, Envoy Extraordinary and Minister Plenipotentiary of his Majesty the King of Norway (appointed by the Government of the Kingdom of Norway), and Mr. James Vallotton, Docteur en droit, member of the bar of Lausanne, Associat of the Institut de Droit International, President of the Tribu-

nal (appointed at the request of the two Governments, by the President of the Swiss Confederation), which was a proceeding between the United States of America and the Kingdom of Norway, to arrive at just compensation for certain property requisitioned by the United States, the Tribunal awarded the *fair market value* of the claimant's property, and in addition thereto it awarded as a part of just compensation a lump sum to each claimant in respect of interest covering the period during which claimant's property was used by the United States.

In Children's Hospital v. Adkins, 284 Federal Reporter 613, in an opinion by Van Orsdel, Associate Justice of the Court of Appeals of the District of Columbia, in discussing the constitutionality of the Federal minimum wage law, there apears the following language, which is peculiarly applicable to the position taken by the Government in the case at bar:

> "Legislation tending to fix the prices at which private property shall be sold, whether it be a commodity or labor, places a limitation upon the distribution of wealth, and is aimed at the correction of the inequalities of fortune which are inevitable under our form of government, due to personal liberty, and the private ownership of property. These principles are embodied in the Constitution itself, and to interfere with their freedom of operation is to deprive the citizen of his constitutional rights. In other words, regardless of public sentiment or popular demand, such a radical change, if deemed necessary, should not be accomplished by legislative enactment or judicial interpretation, but by way of amendment in the orderly way provided."

. . . . . .

"The police power cannot be employed to level inequalities of fortune. Private property cannot by mere legislative or judicial fiat be taken from one person and delivered to another, which is the logical result of price fixing. As was said by Mr. Justice Pitney, in the Coppage Case:

"'But the Fourteenth Amendment, in declaring that a state shall not "deprive any person of life, liberty or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as coexistent human rights, and debars the states from any unwarranted interference with either. And since a state may not strike them down directly it is clear that it may not do it indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.'"

. . . . . .

"The tendency of the times to socialize property rights under the subterfuge of police regulation is dangerous, and if continued will prove destructive of our free institutions. It should be remembered that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty and property, the chief of these is property; not that any amount of property is more valuable than the life or liberty of the citizen, but the history of civilization proves that, **when the citizen is**

deprived of the free use and enjoyment of his property, anarchy and revolution follow, and life and liberty are without protection.

"The highest freedom consists in obedience to law, and a strict adherence to the limitations of the Constitution. In no way can the freedom of the citizen be more effectively curtailed and ultimately destroyed than by a deprivation of those inherent rights safeguarded by our fundamental law. The security of society depends upon the extent of the protection afforded the individual citizen under the Constitution against the demands and incursions of the Government. The only tyranny the citizenship of this republic need fear is from the government itself. The character and value of government is measured by the security which surrounds the individual in the use and enjoyment of his property. These rights will only remain secure as long as the Bill of Rights—the first ten amendments of the Constitution—are construed liberally in favor of the individual and strictly, against the government. They were early adopted because of a widespread apprehension that the time might come when the government would assume to trespass upon those inalienable individual rights announced in the Declaration of Independence and afterwards incorporated in the Bill of Rights. Courts, therefore, should be slow to lend aid to the government in this modern tendency to invade individual property rights.

" 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be

liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*' Boyd v. United States, 116 U. S., 616, 635, 6 Sup. Ct. 524, 535 (29 L. Ed. 746)."

. . . . . .

"Let no one imagine for a moment that our civilization is such that property rights can thus be socialized without the grossest abuse of the privileges granted, or that the restraint of the abuses can be left with safety to legislative or judicial discretion."

The rights of the citizen are well summed up in the language of District Judge Peck:

> **"How can there be a full and just equivalent unless the plaintiff receives from the Government as much as it might have received from others in the open market for this coal?"**
>
> C. G. Blake Co. v. U. S., 275 Fed. 861, 867 (1922).

And where there is, as in this case, an actual market, with numerous transactions in a given staple commodity, the actual market price in such market is the best and only evidence of value, either in ascertaining just compensation or in determining the measure of contractual right and liability as between citizens. As has been well remarked, the individual who has prop-

erty which is taken for public use should not be required to make a greater contribution to the public welfare than other citizens; in rejecting the theory of "cost plus a reasonable profit" advanced by the Government in a similar matter, Gulf Refining Co. v. The United States, Petition No. 34,120, decided June 12, 1922, the Court of Claims said, per Chief Justice Campbell:

> "It is to be admitted that the exigencies of war may render it more or less difficult to ascertain what the just compensation should be, but the existence of a state of war cannot be justly said to suspend the provisions of the Fifth Amendment. The Cohen Grocery Co. Case, 255 U. S. 81; Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 156. **The same rules are applicable in the ascertainment of values of property taken during a war as are applicable for property taken during times of peace.** As has been suggested, it may be more difficult to find what the market value is, for instance, in times of war than it would be to find what the market value of a commodity is in time of peace, but if there be a market the fact is as controlling in the one time as it is in the other. A war may, and does, enhance prices, and one of its horrors is that it may, by injuring or destroying supplies, produce distress and want, but that does not justify the taking of property of an individual at less value than the individual himself would have to pay to supply its place. The individual having property which is taken for public use is not required to make a greater contribution than other citizens similarly situated to the public good, and all other citizens are expected to bear their part of the general expense. It is not necessary to abandon well-established principles of law in order to

hold the balance even between the citizen and the Government when his property is thus taken. Just compensation is all that can be asked for, and just compensation should be given for property taken in time of war as well as that taken in time of peace. **The value of the property must be arrived at, if possible, and its market value is its true measure of value if that can be determined in the particular case.''**

There were in the market so-called spot prices and so-called contract prices for coal The contract price applies where the buyer obligates himself to take and pay for certain amounts of coal at a given time in the future. There were likewise in this market two different prices for coal, domestic and export.

The Government contends that it should have the benefit of the so-called contract prices for coal, and, further, that evidence as to prices of domestic coal should have been admitted.

Contract prices made presently for future delivery, are wholly irrelevant to the question of present prices for immediate delivery. The Navy did not choose to contract for its requirements as the other Government departments in fact did; it chose to commandeer and to have the advantage of the fluctuations of the market. If the market price had gone down, the Government would then have had the advantage thereof. The coal commandeered by it was for immediate delivery and it was immediately taken and used by the Government; the citizen therefore must be paid what he could have obtained in the open market therefor—and in the best available open market, to wit, the spot export market.

In dismissing the Government's contention that it was entitled to have the value of the property taken determined upon evidence of domestic prices, the Circuit Court of Appeals below applied the principle settled by the decisions; that the owner is entitled to receive as just compensation for his property taken by the Government, the full market and pecuniary value thereof for all available uses and purposes to which it might have been applied and for which it might have been sold at the time of the taking.

Thus, Mr. Justice Lurton, in U. S. v. Chandler Dunbar Co., 229 U. S. 53 (1912), said:

> "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes."

And in Boom Co. v. Patterson, 98 U. S. 403, 407 (1878), Mr. Justice Field said:

> "The inquiry in such cases must be, what is the property worth in the market, **viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted.**"

There was affirmative testimony in this case, uncontradicted and undisputed, that the claimant herein was engaged primarily in the export business and that the coal which had been taken by the Government was intended for the export market, and that the whole thereof could readily have been disposed of in the export market at the prices here claimed by the defend-

ant-in-error. In the language of the decisions, the property taken by the Government was, without any question of doubt, adapted and available for export and bunker purposes, and the defendant-in-error was therefore justified, in establishing the market value of its coal, "to avail itself of the prices in that market in which, but for the action of the Government it could, and according to the habit of its business probably would, have sold its coal. That was the price in the export market."

We confidently submit that there is in the record overwhelming, uncontroverted and unimpeached testimony of facts establishing a market for spot coal for export or bunkering purposes during the period in question.

The issue tendered by the Government was not one of fact but of constitutional law. *No offer* or *attempt* was made to *disprove any of the facts* shown so conclusively by defendant-in-error. The utmost that plaintiff-in-error's star witness, Commander Colby, could say was that the trade journals did not show transactions on all the dates in question. (Transcript, p. 116.) The exhibit shows that he was mistaken in this. (Appendix to Paper Book of Defendant-in-error.) The criticism, if it were sound, but it is not, would have been applicable only to a transaction or two. But the absence of other transactions at the particular moment, or even on the day, does not preclude the application of the salutary market value rule. In general there was a market. Five experts in that market testified as to what the market prices were in transactions for immediate delivery. One of these witnesses

sold a million tons for export during the period in question. (Transcript, p. 69.) All were engaged exclusively in the coal trade. Most were engaged exclusively in the export coal trade. In the absence of actual transactions on that particular day, resort could not be had to "cost plus a reasonable profit," but the inquiry would be broadened so as to include the nearest available market plus transportation and so as to take in other sales reasonably near in point of *time*. The inquiry is much simpler than the market price of real estate, which may not have been sold for years and with regard to which it may be difficult to find applicable sales. Yet in regard to real estate in eminent domain cases no Federal Court or Court of any of the forty-eight States has ever found it necessary to tread the "unpathed waters, undreamed shores" of "cost plus a reasonable profit."

The nubbin of the controversy is found in the plaintiff-in-error's seventh request for charge. (Transcript, p. 139.) This requests the Court to charge that the measure of damages is "cost plus a reasonable profit." This was the new gage invented by the Navy and thrown at the feet of an astonished profession and community. The answer to "cost and a reasonable profit" was that it ignored the substance of the duty to pay just compensation as construed by every court; that it would take from the citizen on an arbitrary and conjectural basis his property for which he could instantly have obtained gold dollars in an eager market; and that it affected to set up a standard so difficult, so complicated, so speculative as to swamp the courts and litigants in mazes of interminable ques-

tions of accountancy and fact and mixed law and fact: What is cost? Whose cost? What is a reasonable profit? Whose reasonable profit?

The issue is of market value versus "cost plus a reasonable profit." The former is a clear and readily understood, easily applied, standard, invoked through generations. It has stood the test of time. The latter is a monstrous suggestion, unknown, untried and incapable of rational application or reasonable certainty.

The evidence offered by the Government was without legal significance and was irrelevant and immaterial to the issue; and the verdict and judgment are amply sustained in fact and in law.

IRA JEWELL WILLIAMS,
For Defendant-in-Error.

CHARLES L. GUERIN,
YALE L. SCHEKTER,
F. R. FORAKER,
FRANCIS SHUNK BROWN,
Of Counsel.

APPENDIX.

1. That "just compensation" means market value for the best use to which the property can be put at the time it is taken, is a well-settled principle of Federal and State jurisprudence of universal application when there is an actual market for the property at the time of the taking.

Monongahela Navigation Co. v. U. S., 148 U. S. 312 (1892);
Five Tracts of Land v. U. S., 101 Fed. 661 (1900);
U. S. v. Inlots, Federal Cases No. 15, 441 (1873);
Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 536 (1892);
Boom Co. v. Patterson, 98 U. S. 403 (1878);
U. S. v. Chandler-Dunbar Co., 229 U. S. 53 (1912);
U. S. v. First National Bank, 250 Fed. 299 (1918);
City of New York v. Sage, 239 U. S. 57 (1915).

All of the above cases were condemnation proceedings instituted by the United States, pursuant to an Act of Congress, where the effort was to ascertain "just compensation," and they uniformly announce the principles contended for by defendant-in-error. Pertinent extracts therefrom are referred to as follows:

In *Five Tracts of Land v. U. S.*, the Circuit Court of Appeals for the Third Circuit, per Gray, *J.*, ap-

proving the charge of the Court below on the correct measure of "just compensation," in which was discussed, *inter alia*, a claim of the owners to the "historic value" of the property, as follows, page 665:

> "There is no doubt that historic association may enter into the market value of land, but you are not to give, as separate items, first, market value; and, second, historic value. If you did that, you would depart from what I have said to you the *law has established as the measure of just compensation, which is market value.* But, as I said to counsel during the course of the cause, if a piece of land has in the market a value because there are trees upon it, a value because there are stones upon it, a value because it may be used to raise cereals, a value for any other physical peculiarity of the property, if it also has in the market a value based upon its historical associations, that as much enters into *market value* as would a mine opened upon the property, or a well dug upon it. It is a part of the different matters that go to contribute to the sum total of *market value.* Just in that way you are entitled to consider historic value, if you believe from the evidence that *market value* is at all enhanced by historic value. . . . Nor, *keeping your minds always to market value,* you are to consider the valuation with reference to the necessities of the Government of the United States to take the property, or the particular purposes to which the United States Government proposes to put it. . . . *You are getting at the market value.* Therefore observe, not what the United States migh be willing to pay in order to carry out the purpose which it has in view,—that is not the question,—but *what in the market would any purchaser desiring to buy this property be*

> *willing to give for it*, considering all the elements that have been stated, in order to acquire it from a seller willing to sell."

In *U. S. v. Chandler-Dunbar Co.*, Mr. Justice Lurton said, page 81:

> "The owner must be compensated for what is taken from him, but that is done when be is paid *its fair market value for all available uses and purposes.*"

In *City of New York v. Sage*, Mr. Justice Lurton also wrote the opinion of the Supreme Court, using the following language, page 61:

> "But what the owner is entitled to is the value of the property taken, and that means *what it may fairly be believed that a purchaser in fair market conditions would have given for it in fact —not what a tribunal at a later date may think a purchaser would have been wise to give,* nor a proportion of its advance due to its union with other lots."

In Monongahela Navigation Company v. United States, 148 U. S. 312 (1892), where the Federal Government had condemned for public uses certain property of the company, it was held that the United States must return the exact equivalent for it to the company. Mr. Jusice Brewer said, page 325:

> "The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the Government, the last, the one in point here, being, 'Nor shall private prop-

erty be taken for public use without just compensation.' The noun 'compensation' standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of these two words, be no doubt that the compensation *must be a full and perfect equivalent* for the property taken."

In United States v. Chandler-Dunbar Co., 229 U. S. 53 (1912), Mr. Justice Lurton said, at page 80:

"In a condemnation proceeding, the value of the property to the Government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid its *fair market value for all available uses and purposes.*"

In Boom Co. v. Patterson, 98 U. S. 403 (1878), Mr. Justice Field said, at page 407:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, *what is the property worth in the market,*

viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted."

In United States v. First National Bank, *et al.*, 250 Fed. 299 (1918), where the United States had taken possession of land for a military camp and thereafter began condemnation proceedings, it was held that the owners were entitled to recover as compensation the value of the property at the time of the actual taking. Judge Clayton said, at page 301:

> "'Just compensation' means equitable compensation; that the owner shall be saved harmless as near as may be, and shall recover the damage which he has actually sustained. . . . Fair, reasonable, adequate, just compensation, for the loss or injury the owner may sustain, the Constitution guarantees to the citizen whose property is taken for public uses. . . . The question in these cases relates first to *the value of the lands appropriated which is to be assessed with reference to what it was worth for sale, in view of the uses to which it might have been applied*, and not simply in reference to its productiveness to the owner in the condition in which he saw fit to leave it."

In Kanakanui v. United States, 244 Federal 923 (1917), Judge Gilbert said, at page 924:

> "The only limit upon the power of the United States to exercise the right of eminent domain is that just compensation shall be made for the property taken. Just compensation means the *full equivalent* for the property taken."

In United States v. Town of Nahant, 153 Fed. 520 (1907), where it appeared that the United States, by the Secretary of War, had condemned certain property of the town for Government purposes, it was held (Judge Aldrich delivering the opinion of the Court) as the syllabus reads in part:

> "Where the United States in its sovereign capacity exercises its arbitrary power to condemn private property for necessary public use, the just compensation which it is required by the Constitution to make to the owner should be determined on equitable principles, and should be such as to put the owner *in as good condition pecuniarily as he would have been if the property had not been taken.*"

In Benedict v. New York, 98 Fed. 789 (1889), Circuit Judge Wallace said, at page 790:

> "Just compensation entitles the owner to the *full market or pecuniary value of his property at the time of the taking,* and the authorities are so generally in accord upon this proposition that it may be accepted as the general rule."

The measure of compensation, where property is condemned for the use of the United States, and the entire property is taken, is the *fair, full market value of the property, in cash:* U. S. v. Inlots, Federal Cases No. 15,441 (1873).

"Just compensation," within the meaning of the compensation to be awarded in condemnation proceedings, means *full compensation for everything or element of value taken:* Kennebec Water Dist. v. City of

Waterville, 54 Atl. 6, 9; 97 Md. 185; 60 L. R. A. 856 (1903).

"Just compensation," provided by the Constitution (Art. 1, Sec. 6), as damages for the taking of private property for public use, is to be measured by the *market value* of the property where the whole property is taken: Brainerd v. State, 131 N. Y. Sup. 221, 225; 74 Misc. Rep. 100 (1911).

Under Constitution (Art. 13, Sec. 12), declaring that no man's property shall be taken or applied to public use without just compensation being made to him, commissioners appointed to assess the damages for land taken by a railroad company, in fixing the compensation for the land actually taken, must take into their consideration *the market value of the land*, which can always be approximated. This value would be the measure of the compensation guaranteed by the Constitution: Wilson v. Rockford, R. I. & St. L. R. Co., 59 Ill. 273, 275 (1871).

The "*just compensation*" which is guaranteed by the Constitution to the owner whose property is to be taken or damaged for public use *is its market value*, and the market value of land is determined by a consideration of all the uses to which it may be applied, as well as the purposes for which it is adapted. For the purpose of ascertaining this value, it is proper to show its condition and surroundings, the uses to which it has been applied, and its capabilities for other uses, including that for which its condemnation is sought. Its value is not limited either by that of its present use or by the use for which it is sought, since either

of these may be less than its market value. *The owner is entitled to its highest market value for any use to which it is adapted,* and any advantages that the property has, present or prospective, and for which it may be available, constitutes an element in its value which is to be considered by the jury in determining the compensation to be awarded him, and which the owner is entitled to show to the jury by any competent evidence: Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 536; 28 Pac. 681, 683 (1892).

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Date	In Gross Tons First Suit	Invoice Number	Market Prices F. O. B. Mines	Amount Sued For	Our Spot Sales		Norfol Market Fr Nov. 5, 19
1919	Tons				Order No.		
Sept. 18	8500	5750	$5.00	$42,500.00	1527	$5.00	
Oct. 17	2319	5788	5.00	11,595.00	1553	6.23	
Dec. 1	5000	5903	4.536	22,680.00	1577	4.536	
1920							
Jan. 28	2864	5919	4.536	12,991.10	1607	4.536	
Feb. 2-5	4668.6071	5935	4.536	21,176.80	1613	4.536	
Mar. 23	3500	6075	4.536	15,876.00	1661	4.536	
Jan. 23)							
Feb. 21)	155.2232	6074	4.536	704.09	1651	4.536	
Mar. 4)							
Apr. 23	3170	6076	6.50	20,605.00	1695	6.50	
June 3	3479	6114	11.00	38,269.00	1727	10.42	
June 3	2925	6115	11.00	32,175.00	"	10.42	
June 2	583	6116	11.00	6,413.00	"	10.42	
Aug. 3	4981	6202	16.00	79,696.00	1763	15.94	
Sept. 7	4994	6291	14.70	73,411.80	1788½	15.00	
Sept. 15	1991	6292	13.70	27,276.70	1793	13.86	
Oct. 23	1960	6315	13.70	26,852.00	1829	13.61	$13.45—$1
	51089.8303			$432,221.49			
	Second Suit						
1920	Tons						
Nov. 5	1774	6334	12.20	$21,642.80	1842	$12.51	12.70— 1
Nov. 23	819	6349	8.45	6,920.55	1858	9.11	
Nov. 25	278	6350	8.45	2,349.10	1862	8.11	7.95—
Dec. 8	1457	6376	6.70	9,761.90	1880	7.05	6.45—
	4328			$40,674.35			
	Third Suit						
1920	Tons						
Dec. 10	790	6384	5.95	$4,700.50	1884	6.26	5.95—
Dec. 13	257	6385	5.45	1,400.65	1885	6.20	5.95—
Dec. 14	610	6386	5.45	3,324.50	1889	6.61	
Dec. 16	252	6389	5.45	1,373.40	1892	6.26	570—
1921							
Jan. 6	857	6406	4.70	4,027.90	B-5	5.11	
Jan. 11	406	6411	4.70	1,908.20	B-8	5.11	
Jan. 13	914	6429	4.70	4,295.80	C-3	4.60	
Jan. 14	821	6430	4.70	3,858.70	C-3	4.60	4.45—
Jan. 17	150	6437	4.70	705.00	B-13	4.12	
Jan. 18	252	6440	4.70	1,184.40	B-13	4.12	
	5309			$26,779.05			
Grand Total	60,726.8303			$499,674.89			

GOVERNMENT NAVY DEPARTMENT

& ACCOUNTS

Black Diamond		Saward's Journal		Coal Trade Journal	
9/20—Page 269	$5.00	9/20—Page 414	$5.00	None	
10/18—Page 349	5.00	10/18—Page 452	5.00	None	
Gov't Price		Gov't Price		Gov't Price	
Gov't Price		Gov't Price		Gov't Price	
Gov't Price		Gov't Price		Gov't Price	
Gov't Price		Gov't Price		Gov't Price	
Gov't Price		Gov't Price		Gov't Price	
4/24—Page 406	6.50	4/24—Page 1008	7.00	None	
6/5 —Page 599	11.00	6/5 —Page 108	11.00	6/9 —Page 622	$10.20
6/5 —Page 599	11.00	6/5 —Page 108	11.00	6/9 —Page 622	10.20
6/5 —Page 599	11.00	6/5 —Page 108	11.00	6/9 —Page 622	10.20
8/7 —Page 132	16.00	8/7 —Page 291	17.20	8/4 —Page 856	17.20
9/11—Page 242	14.70	9/11—Page 402	13.70	9/8 —Page 996	15.20
9/18—Page 266	13.70	9/18—Page 419	12.70	None	
		10/23—Page 533	13.20	None	
11/13—Page 496	12.20	11/6 —Page 576	12.32	11/10—Page 1254	13.20
11/27—Page 544	11.25	11/20—Page 625	10.20	11/24—Page 1314	7.20
11/27—Page 544	11.25	11/20—Page 625	10.20	12/1 —Page 1344	8.20
12/11—Page 591	6.70	12/4 —Page 673	7.70	12/8 —Page 1372	7.70
12/11—Page 591	6.70	12/11—Page 695	7.70	12/15—Page 1404	7.70
12/18—Page 616	6.20	12/18—Page 721	5.70	12/15—Page 1404	7.70
12/18—Page 616	6.20	12/18—Page 721	5.70	12/15—Page 1404	7.70
12/18—Page 616	6.20	12/18—Page 721	5.70	12/22—Page 1427	5.20
1/15—Page 64	5.20	1/8 —Page 809	5.70	1/5 —Page 10	4.70
1/15—Page 64	5.20	1/15—Page 835	5.15	1/12—Page 41	4.70
1/15—Page 64	5.20	1/15—Page 835	5.15	1/19—Page 67	4.70
1/15—Page 64	5.20	1/15—Page 835	5.15	1/19—Page 67	4.70
1/22—Page 91	4.20	1/22—Page 858	5.00	1/19—Page 67	4.70
1/22—Page 91	4.20	1/22—Page 858	5.00	1/19—Page 67	4.70